No. 76-209

In the Supreme Court of the United States

OCTOBER TERM, 1976

COMMON CARRIER CONFERENCE-IRREGULAR ROUTE, A CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,

ROBERT B. NICHOLSON,
LLOYD JOHN OSBORN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT S. BURK,
Acting General Counsel,

CHARLES H. WHITE, JR.,
Associate General Counsel,

PETER A. FITZPATRICK,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 534 F. 2d 981. The orders of the Interstate Commerce Commission (Pet. App. 9a, 13a-19a) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1976. Petitioner's timely petition for rehearing with suggestion of rehearing *en banc* was denied by orders entered on May 17, 1975 (Pet. App. 6a-8a). The petition for a writ of certiorari was filed on August 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 5(2)(a)-(c), 5(11), 207 and 212(b) of the Interstate Commerce Act, 24 Stat. 379 *et seq.*, as amended, 49 U.S.C. 5(2)(a)-(c), 5(11), 307 and 312(b), and Section 4 of the Administrative Procedure Act, 5 U.S.C. 553, are reproduced at Pet. App. 20a-25a. Section 208(a) of the Interstate Commerce Act, 49 U.S.C. 308(a), is reproduced in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission's gateway elimination rules, insofar as they apply to transferred motor carrier certificates, are within the Commission's statutory authority.

2. Whether those rules were issued upon adequate notice.

STATEMENT

"Tacking" is the practice of combining separate motor common carrier certificates that share a common point, or "gateway," in order to perform a through transportation service, via the "gateway," from points authorized in one certificate to points authorized in the other. Some certificates of public convenience and necessity expressly permit tacking and others expressly prohibit it. When a certificate neither permits nor prohibits tacking, the Interstate Commerce Commission in the past has permitted the practice. Since the Commission had never found that the public convenience and necessity required through service via the gateway, the provision of such service was left to the carrier's option. When a certificate expressly permits tacking, the provision of such service is mandatory.

While some gateway operations resulted in relatively direct through service, others involved varying degrees

of circuity, with a concomitant waste of fuel and loss of efficiency of service. In 1952 the Commission announced criteria by which a carrier conducting substantial operations through a gateway could obtain a certificate authorizing direct service. *Childress—Elimination Sanford Gateway*, 61 M.C.C. 421.[1] However, many carriers failed to utilize the *Childress* approach and continued to conduct circuitous operations through gateways. With the advent of the fuel crisis in 1973 the Commission instituted a rulemaking proceeding to determine whether, or to what extent, tacking served the public interest. A general notice of the proceeding, announcing that "important changes in the Commission's basic approach to tacking and the resulting gateway operations" would be considered, was published in the Federal Register. 38 Fed. Reg. 32269. A formal Notice of Proposed Rulemaking, issued the same day, contained an exhaustive discussion of the proposed rules and indicated that they would apply not only to applications for new authority "but also to transfer and acquisition applications." 119 M.C.C. 170, 197, n. 12.[2]

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[1]Under *Childress*, a carrier can obtain direct authority by showing that substantial operations are being conducted between the points involved over the "gateway" route, that it is already an active competitor for traffic between those points, and that the direct authority would not result in service materially different from that already available.

[2]Section 5(2)(b) of the Interstate Commerce Act, 49 U.S.C. 5(2)(b), provides that one motor carrier may acquire the outstanding certificate of another only if the Commission determines that the proposed transaction "will be consistent with the public interest * * *." Transactions involving smaller carriers are relieved of this requirement (49 U.S.C. 5(10)), but must nevertheless satisfy certain procedural rules governing transfers of certificates (Section 212(b), 49 U.S.C. 312(b); 49 C.F.R. Part 1132). As the court of appeals noted (Pet. App. 4a), the prospect of tacking has traditionally inspired most transfer applications.

After receiving the views of hundreds of interested parties, including their comments on the impact of the regulations on the transfer and acquisition of motor carrier certificates of public convenience and necessity under Section 5, the Commission adopted new rules governing gateway operations.[3] In essence, the rules prohibit tacking and require a certificate for direct service. Where the total origin-to-destination distance through the gateway route is more than 300 miles, carriers may continue to tack only until their application for direct service is ruled on by the Commission.[4] See 119 M.C.C. 530. These new rules apply only to motor common carriers holding irregular route certificates which neither expressly permit nor prohibit tacking. They apply to such carriers whether the certificates were issued directly to them or were acquired from another carrier.

The Commission subsequently issued a policy statement establishing procedures for implementing the regulations in acquisition and transfer proceedings (Pet. App. 10a-12a), and denied petitioner's request that such transactions be exempted from the rules (Pet. App. 9a, 13a-19a).

On petition for review, the court of appeals upheld the regulations as they pertain to the transfer of

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[3]The proceeding was conducted in accordance with the requirements of Section 4 of the Administrative Procedure Act, 5 U.S.C. 553. The gateway rules are codified at 49 C.F.R. Part 1065 and were sustained in *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131 (D. D.C.), affirmed, 423 U.S. 1041.

[4]The carrier may sustain its burden under the liberalized *Childress* criteria (note 1, *supra*) by introducing evidence of substantial "interchange" operations through the gateway in concert with the previous owner of the transferred certificate. 49 C.F.R. 1065.1(d)(2)(ii)(B); *Gray Moving & Storage, Inc.—Purchase (Portion)—Thomas C. Warner*, 122 M.C.C. 316, 329-330.

certificates. It ruled that whatever "technical flaw" may have existed in the Commission's Federal Register notice was overcome by the simultaneously reported docket notice (119 M.C.C. at 197, n. 12), which disclosed the agency's intent to apply the new gateway approach to future transfers and generated carrier comments on the merits of that proposal (Pet. App. 3a). The court also held that the rules do not offend the public interest standard of Section 5 because that section "is not a guarantee that tacking would be allowed where there has been no satisfaction of the higher standard of public convenience and necessity" (Pet. App. 4a).

ARGUMENT

The decision of the court of appeals is correct, and the petition raises no issue warranting review by this Court.

1. Petitioner contends (Pet. 11) that the court of appeals erred in holding that the tacking of operating rights is a matter of Commission policy "rather than an absolute right of the transferee * * *." But the three-judge court in *Thompson Van Lines, Inc.* v. *United States*, 399 F. Supp. 1131, 1135-1136 (D. D.C.), in affirming the gateway elimination rules as applied to existing and newly issued certificates held by individual carriers, had already held that authority to tack does not constitute a part of a motor carrier's certificate in the absence of an express condition in the certificate. Instead, that authority exists as a result of Commission policy—and that policy can lawfully be changed by the Commission pursuant to its broad rulemaking power under Section 208(a) of the Act, 49 U.S.C. 308(a), to superimpose generally applicable "reasonable terms, conditions, and limitations" on the privileges specifically granted by certificates. See *Thompson Van Lines, Inc.* v. *United States, supra*, 399 F. Supp. at 1135; *Warren Transport, Inc., Extension—Dubuque to*

North Dakota, 98 M.C.C. 761, 763; *Transport Corp. of Virginia Extension—Maryland*, 43 M.C.C. 716, 719. As the court of appeals in the instant case held, Section 208(a) also applies to transferred certificates, so that, even when the Commission has approved a transfer as consistent with the public interest, no vested right to tack is conferred.

There is no merit to petitioner's contention (Pet. 12) that the Commission's "exclusive and plenary" jurisdiction over *transfers* (49 U.S.C. 5(11)) nullifies the agency's general power under Section 208(a) to attach reasonable terms and conditions to *certificates*. Instead, Section 5(11) is merely intended to establish the exclusivity of the Commission's authority over transfers notwithstanding any state or municipal law or any other federal statute. See *B.F. Goodrich Co.* v. *Northwest Industries, Inc.*, 303 F. Supp. 53 (D. Del.); *Chicago South Shore & South Bend R.* v. *Monon Railroad*, 235 F. Supp. 984 (N.D. Ill.); *Tsimensi* v. *New York Central R. Co.*, 34 A.D. 2d 531, 309 N.Y.S. 2d 22. There is likewise no merit to petitioner's suggestion (Pet. 11, n. 5) that the right of a carrier to "own and operate" (49 U.S.C. 5(11)) an acquired certificate embraces the right to tack that certificate with other authorities. Neither the language of Section 5(11) nor its legislative history contain any reference to the tacking of certificates. See H.R. Conf. Rep. Nos. 2016 and 2832, 76th Cong., 3d Sess. (1940). The ownership and operation of transferred certificates are necessarily subject to whatever conditions are contained in such certificates or imposed by the Commission pursuant to Section 208(a).

As the court of appeals recognized (Pet. App. 4a), the gateway elimination regulations do not conflict with the "public interest" standard governing the transfer of certificates under Section 5. The transfer of certificates continues to be governed by that standard. However, if the transferee intends to tack the acquired certificate with

other authorities, it must also demonstrate that the public convenience and necessity require such operations. In advancing the policy underlying the gateway elimination rules—curtailment of circuitous and wasteful gateway operations—the Commission has thus afforded similar treatment to all certificates held or acquired by irregular route carriers: tacking is no longer permitted. Only if the carrier shows that the public convenience and necessity require direct operations may it offer through service. There is no requirement that the Commission give special treatment to certificates acquired from other carriers.

2. The court of appeals did not err in rejecting petitioner's contention that the Commission provided insufficient notice of its intention to apply the gateway elimination rules to transferred certificates. A general notice of the rulemaking proceeding was published in the Federal Register. 38 Fed. Reg. 32269. The simultaneously reported Notice of Proposed Rulemaking indicated that the proposed rules would apply to transferred certificates. That notice prompted comments from a number of irregular route carriers on this aspect of the proposal and additional comments were filed seeking reconsideration of the gateway regulations as initially adopted (Pet. App. 3a). The court of appeals, recognizing that Section 4 of the Administrative Procedure Act, 5 U.S.C. 553, "does not require every aspect of the proposed order to be explained in the general notice" (Pet. App. 3a), correctly held that this constituted sufficient notice. See *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, 387 F. 2d 220, 226 and n. 26 (C.A. D.C.); *Chrysler Corp.* v. *Department of Transportation*, 515 F. 2d 1053, 1061 (C.A. 6); *California Citizens Band Ass'n* v. *United States*, 375 F. 2d 43, 47-49 (C.A. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

ROBERT B. NICHOLSON,
LLOYD JOHN OSBORN,
Attorneys.

ROBERT S. BURK,
Acting General Counsel,

CHARLES H. WHITE, JR.,
Associate General Counsel,

PETER A. FITZPATRICK,
Attorney,
Interstate Commerce Commission.

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APPENDIX

Section 208(a) of the Interstate Commerce Act, 49 Stat. 552, 49 U.S.C. 308(a), provides:

> Any certificate issued under section 206 and 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6); *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.